No. 92-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST DAVIDSON, DARLENE DAVIDSON,
Individually and as Guardians ad Litem
of SHERENE DAVIDSON and ERNEST DAVIDSON, JR.,
their minor children,

Petitioners,

v.

VELSICOL CHEMICAL CORPORATION,
an Illinois Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

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BRIEF IN OPPOSITION

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RULE 29.1 LIST

Respondent, Velsicol Chemical Corporation, has no parent companies or subsidiaries to list pursuant to Rule 29.1.

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BRIEF IN OPPOSITION

OPINIONS BELOW

On April 5, 1991 the District Court for Clark County, Nevada granted the motion *in limine* of respondent Velsicol Chemical Corporation ("Velsicol") and ruled that petitioners' inadequate labeling claims in this common law tort case were preempted by federal law. That Order is unreported and is reproduced at Pet. App. 20a-25a. On June 5, 1991, the District Court denied petitioners' motion for reconsideration, certified the April 5 Order for interlocutory appeal to the Nevada Supreme Court and stayed further proceedings on the remaining claims pending resolution of the appeal. That Order is likewise unreported and is reproduced at Pet. App. 26a-32a. The opin-

ion of the Supreme Court of the State of Nevada affirming the District Court's *in limine* ruling is reported at 834 P.2d 931 (Nev. 1992) and is reproduced at Pet. App. 1a-19a.

JURISDICTION

The decision of the Nevada Supreme Court was issued on an interlocutory appeal from a pretrial ruling of the District Court that disposed of some but not all of the pending claims in this case. Accordingly, for reasons set forth more fully *infra*, at pages 9-11, the decision of the Nevada Supreme Court is not a "final judgment[] or decree[]." The Court, therefore, lacks jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

This action asserts claims under various common law theories of negligence and strict liability arising out of petitioners' asserted exposure to Gold Crest Termide, a pesticide manufactured by Velsicol and properly registered and labeled under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. In its ruling below the Nevada Supreme Court held that those of petitioners' claims which challenge the adequacy of Velsicol's product label are preempted by FIFRA, which forbids states to "impose or continue in effect any requirements for labeling or packaging in addition to or different from those" imposed under FIFRA. 7 U.S.C. § 136v(b). Pet. App. 18a. Its decision was the first appellate opinion after this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), to consider FIFRA's preemptive effect on common law claims. Since then two United States courts of appeals have considered the issue, and both have likewise ruled that common law inadequate labeling claims are preempted under FIFRA.[1] These rulings are sound and correct.

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[1] *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

1. For the first 25 years of its existence, FIFRA was primarily a licensing and labeling statute. In 1972, however, Congress completely revised and significantly strengthened FIFRA's registration and labeling standards. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In the process, FIFRA was expanded to regulate the use of pesticides, as well as their sale and labeling; to reach pesticides produced and sold wholly intrastate, as well as interstate; to provide for review, cancellation and suspension of registrations; and to enhance greatly the enforcement authority of the Environmental Protection Agency ("EPA"). *Id.* In effect, the 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). As amended, FIFRA thus prohibits the sale, distribution, shipment and receipt of any pesticide not labeled under the Act and registered with EPA. 7 U.S.C. § 136a.

Product registration under FIFRA requires a manufacturer to undertake extensive testing and to submit voluminous data to EPA, including, for example, results of studies concerning toxicity, carcinogenicity, mutagenicity, reproductive effects, effects on metabolism and environmental fate. *See* 7 U.S.C. § 136a(c)(2); 40 C.F.R. § 158. *See also Ruckelshaus*, 467 U.S. at 998. After reviewing the manufacturer's data, along with additional information obtained from EPA's own data gathering analysis or from public hearings, 7 U.S.C. §§ 136a(c)(4), 136r, 136s, EPA may then register a pesticide product only if it determines that:

> (i) the product's composition is such as to warrant the proposed claims for it;
>
> (ii) it will perform its intended function without unreasonable adverse effects on the environment (including man, animals, plants, water, air, land, and the interrelationships among them);

(iii) when used in accordance with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects on the environment; and

(iv) its labeling and packaging comply with FIFRA and its implementing regulations.

See 40 C.F.R. § 152.112; 7 U.S.C. §§ 136a(c)(5), 136(j).

With respect to labeling, FIFRA imposes stringently detailed requirements.[2] Thus, EPA's implementing regulations control:

(i) the contents of the label, requiring that it "clearly and prominently" display:

(a) name, brand or trademark;

(b) name and address of registrant;

(c) net contents;

(d) product registration number;

(e) producer's registration number;

(f) ingredient statement;

(g) warning or precautionary statements;

(h) directions for use; and

(i) use classifications;

(ii) label prominence, requiring that information be "placed with such conspicuousness" and "expressed in such terms" that it is "likely to be read and understood by the ordinary individual under customary conditions of purchase and use;"

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[2] FIFRA defines "label" to mean "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. § 136(p)(1). The term "labeling" is in turn defined as "all labels and all other written, printed, or graphic matter . . . (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide . . . ." 7 U.S.C. § 136(p)(2).

(iii) label legibility, including type size and clarity;

(iv) language to be used;

(v) placement of the label; and

(vi) label accuracy, so that a product is "misbranded" (subjecting the registrant to civil and criminal penalty) "if its labeling is false or misleading in any particular, including both pesticidal and nonpesticidal claims."

40 C.F.R. § 156.10(a).

Moreover, the regulations *require* certain prescribed hierarchical "front panel" warnings and precautionary statements. 40 C.F.R. § 156.10(h). These warnings include, *inter alia*:

(i) specified human hazard signal words, prescribed according to degree of toxicity, as defined in the regulations;

(ii) uniform child hazard warnings;

(iii) statements of practical treatment;

(iv) statements of hazard to humans and domestic animals, including precautionary statements identifying route(s) of exposure and means of accident prevention;

(v) statements of environmental hazards; and

(vi) specific statements of physical or chemical hazards.

40 C.F.R. § 156.10(h).

Approved labels must also contain "conspicuous" directions for use of the pesticide "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. § 156.10(i). EPA must find the directions "adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.* FIFRA requires the listed directions to include:

(i) application site;

(ii) target pests;

(iii) dosage rates;

(iv) application method;

(v) application timing and frequency;

(vi) limitations on reentry to the application site;

(vii) storage and disposal information; and

(viii) limitations or restrictions on use.

40 C.F.R. § 156.10(i)(2).

As amended in 1972 FIFRA also carefully delineates the role of the States and State law. *See Wisconsin Public Intervenor*, 111 S. Ct at 2476. Thus, for example, a State may under specified conditions, provide registration for additional uses of federally registered pesticides to meet special local needs. 7 U.S.C. § 136v(c). A State may also regulate the "sale or use" of a federally registered pesticide so long as it does not permit any sale or use otherwise prohibited by EPA. 7 U.S.C. § 136v(a). As to labeling, however, the statute is categorically preemptive:

(b) Uniformity

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). It is this provision upon which the decisions below rested.

2. Velsicol is the manufacturer of Gold Crest Termide, a termiticide concentrate that Velsicol duly registered with EPA in 1975. The product label approved by EPA in 1975 specified two approved methods of application and instructed that the product was to be applied only as specified on the label. In 1979 a third-party pes-

ticide applicator misapplied Velsicol's product to petitioners' partially constructed residence in a manner not permitted by the label.[3] As a result of the misapplication, petitioners claim they were harmfully exposed to the product.

Petitioners thereafter filed suit against both the applicator and Velsicol, asserting various tort claims under the Nevada common law of negligence and strict liability. After settling with the applicator, petitioners sought to pursue their claims against Velsicol, urging, *inter alia*, that the EPA-approved product label was inadequate. In January 1991 petitioners asked the trial court, by motion *in limine*, to rule that a post-application change in the product label would be admissible at trial as evidence of the 1975 label's inadequacy.[4] Velsicol opposed petitioners' motion and itself filed a motion *in limine* asking the trial court to rule that any claims challenging the adequacy of the Gold Crest Termide label were preempted by FIFRA.

On April 5, 1991 the District Court denied petitioners' motion and granted Velsicol's motion, ruling that FIFRA preempts petitioners' claims based on inadequate labeling. Pet. 21a-23a. Thereafter, by Order dated June 5, 1991 the District Court declined to reconsider its preemption ruling, certified the April 5 Order for interlocu-

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[3] The EPA-approved label specified below-ground application of the product in crawl space areas by "rodding" or "trenching." By contrast, the applicator "broadcast sprayed" the product above the ground in an area intended for crawl space construction. Use of a product in a manner inconsistent with the label is sanctionable under FIFRA. *See* 7 U.S.C. §§ 136j(a)(2)(G), 136*l*.

[4] In 1980 Velsicol obtained EPA approval of a new label for Gold Crest Termide. Like the 1975 label, the label approved in 1980 permitted application by rod or trench below the ground in crawl space construction and instructed against any other methods of application. In addition, however, the 1980 label specifically identified broadcast spraying as one of the other methods not permitted in crawl space areas.

tory appeal to the Nevada Supreme Court, and stayed trial of petitioners' remaining, non-label based claims pending resolution of the appeal. Pet. App. 26a-32a.

On August 12, 1992—some six weeks after the decision in *Cipollone*—the Nevada Supreme Court announced its decision affirming the District Court's preemption ruling. Pet. App. 1a-19a. The Nevada Supreme Court reasoned, first, that it could not rest a finding of express preemption on the words of § 136v(b) because that section does not specifically identify common law remedies as among the "requirements" States are precluded from imposing. Pet. App. 8a. The court nevertheless examined in detail the legislative history of that section and its place in the overall statutory structure, Pet. App. 10a-13a, and concluded:

> First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely pre-empt" State authority to change federal labeling. . . . Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by State action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the States to supplement it.

Pet. App. 14a (citation and footnote omitted). The court further concluded that "a jury determination that a label is inadequate would directly conflict with the EPA determination that the label is adequate," Pet. App. 17a, and that "[n]ational uniformity in pesticide labeling would also be frustrated by state common law tort claims." Pet. App. 18a. Accordingly, it held petitioners' inadequate labeling claims preempted under FIFRA.[5] On No-

[5] In its opinion the Nevada Supreme Court candidly expressed difficulty in applying *Cipollone*'s analytical framework. Pet. App. 6a n.2. As a consequence, its preemption holding was framed as a

vember 3, 1992 the court denied rehearing. Pet. App. 33a.

REASONS FOR DENYING THE WRIT

1. The Court's jurisdiciton to review state court decisions is limited under 28 U.S.C. § 1257(a) to "final judgments or decrees rendered by the highest court of a state." That limitation has generally been held "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

In this case, the Nevada Supreme Court rendered its decision on an interlocutory appeal (*see* Pet. App. 1a) from the trial court's order dismissing some, but not all, of petitioners' claims. Pet. App. 26a-32a. The only claims dismissed were those "based upon the alleged inadequacies of VELSICOL's labeling of its product." Pet. App. 29a. Petitioners' non-label based claims remain pending before the District Court, with pre-trial and discovery matters stayed pending resolution of the interlocutory appeal. Pet. App. 31a. Because those claims remain to be determined by the State court, it follows that a "final judgment[] or decree[]" has not yet been rendered in this case for jurisdictional purposes under 28 U.S.C. § 1257(a).[6]

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holding of implied, rather than express, preemption. Pet. App. 14a, 18a. The analysis that led the court to that conclusion, however, closely tracks the analysis undertaken by the Court in *Cipollone*, and the result is the same as that reached by the Tenth and Eleventh Circuits in the only other post-*Cipollone* appellate decisions on this issue. As further demonstrated *infra*, pp. 14-20, that result is clearly correct. The Nevada court's use of the terminology of implied preemption analysis, even if inconsistent with *Cipollone*, is therefore of no significance.

[6] In its June 5, 1991 Order, the District Court characterized the April 5, 1991 Order as having granted partial summary judgment on petitioners' label-based claims (Pet. App. 29a) and certified the

The Court has, in some cases, treated State court judgments as final for jurisdictional purposes even though further State court proceedings would take place. *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469 (1975), identified four categories of such cases. The present case fits none of them.

The first two categories outlined in *Cox* involve cases where the federal issue at stake "would not be mooted or otherwise affected by the proceedings yet to be had" at the State court level, *id.* at 478, because either (a) "the federal issue is conclusive or the outcome of further proceedings is preordained," *id.* at 479, or (b) the federal issue "will survive and require decision regardless of the outcome of further State court proceedings." *Id.* at 480. Neither circumstance is present here. The Nevada Supreme Court's preemption ruling is not determinative of the outcome at trial of petitioners' remaining, non-label based claims, and if petitioners prevail at trial of those claims, the federal issue will become moot. Thus, the preemption question may not survive the further State proceedings.

In the third *Cox* category are cases where "the federal claim has been finally decided, with further proceedings

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April 5 ruling as a "final order for interlocutory appeal" under the Nevada analogue to Fed. R. Civ. P. 54(b). Pet. App. 30a-31a. The District Court's certification does not, however, render the decision a "final judgment or decree." Even under the Federal Rules, entry of partial summary judgment on one or more of several alternative theories of relief does not represent an appealable final order under 28 U.S.C. § 1291, *Cheng v. Commissioner, IRS*, 878 F.2d 306, 309 (9th Cir. 1989), even if entered as a separate judgment under Fed. R. Civ. P. 54(b). *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 593 (7th Cir. 1990). In any event, "finality" for the purpose of 28 U.S.C. § 1257 jurisdiction is a question of federal law, and the State's characterization of the order appealed from as "final"—or not—is not dispositive. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72 (1946). In this case, for the reasons cited in text, the decision of the Nevada Supreme Court does not represent a final judgment or decree, as this Court has construed 28 U.S.C. § 1257 in prior cases.

on the merits in State courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. Here, if petitioners prevail at trial of their remaining claims, the federal issue will become moot. On the other hand, if they lose at trial, petitioners will be able then to seek this Court's review of the preemption ruling, even assuming the Nevada Supreme Court refuses to reconsider the issue as law of the case. *Hathorn v. Lovorn*, 457 U.S. 255, 261-62 (1982); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Urie v. Thompson*, 337 U.S. 163, 171-72 (1949). Thus, petitioners do not fall within the third category of *Cox*.

The final *Cox* category includes cases "where reversal on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [and] a refusal immediately to review the State court decision might seriously erode federal policy." 420 U.S. at 482-83. Here reversal on the federal issue would not preclude any further litigation; to the contrary, it would expand the litigation below by reinstating previously dismissed claims. Plainly, this case does not fall within the fourth category identified in *Cox*.

For these reasons, the interlocutory judgment of the Nevada Supreme Court is neither final in the traditional sense, nor does it fit any of the pragmatic exceptions to the traditional finality test identified in *Cox*. The Court, therefore, lacks jurisdiction to grant the petition. *Flynt v. Ohio*, 451 U.S. 619, 621-23 (1981).

2. Petitioners argue that this Court's review is necessary to resolve an irreconcilable split among the lower federal and state courts over whether FIFRA preempts state common law claims of inadequate labeling. Pet. 9-14. This argument suffers from two major defects.

First, the overwhelming majority of the purportedly conflicting cases cited by petitioners are those of federal

and state trial courts or intermediate state appellate courts. This Court does not ordinarily grant review to resolve a conflict between the decision of a state court of last resort and those of lower courts; rather, its review ordinarily is, and properly should be, limited to resolving conflicts between a highest state court's decision of a federal question and decisions of that question by a United States court of appeals or another state court of last resort. *See, e.g.*, S. Ct. R. 10.1(b). Among courts in that category, there was considerable uniformity even before *Cipollone*,[7] and since *Cipollone* there has been complete uniformity, at least of result.

Second, and more importantly, in attempting to draw a portrait of confusion and conflict among the lower courts, petitioners wrongly rely upon decisions before *and* after *Cipollone*. The relevant time period to examine is the period *after* the Court's decision last term of *Cipollone*. It is, after all, that case which enunciated the principles that govern the determination of the effect on

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[7] Prior to *Cipollone*, five United States courts of appeals and one state supreme court had ruled on the preemptive effect of FIFRA on state common law inadequate labeling claims. Four of the five U.S. courts of appeals found in favor of FIFRA preemption; the remaining court of appeals and the single state supreme court held otherwise. *Finding preemption*: *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992); *National By-Products, Inc. v. Pope*, 959 F.2d 235 (6th Cir. 1992) (table) (opinion available on LEXIS, 1992 U.S. App. LEXIS 6752), *aff'g* Civil Nos. 86-207, 86-397 (E.D. Ky. Mar. 8, 1991); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S. Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir. 1993); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand*, 985 F.2d 516 (11th Cir. 1993). *Holding against preemption*: *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992).

state common law claims of statutory preemption clauses such as § 136v(b) of FIFRA.[8]

Since *Cipollone*, two U.S. Courts of Appeals and the Nevada Supreme Court in this case have addressed the issue, and all three courts have concluded that FIFRA preempts claims such as those presented by petitioners here. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*"); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*").[9] Thus, there is no split of authority which requires this Court's resolution.

3. Nor does the decision below implicate an important question of federal law that has not been, but should be, settled by this Court now. To the contrary, the most important issue in the case—the principles which govern determination of the preemptive effect of federal statutes that contain explicit preemption provisions—was decided just eight months ago in *Cipollone*. Petitioners have suggested no reason, and none exists, for this Court to revisit *Cipollone* so soon.

Moreover, unless the Court is regularly to revisit *Cipollone* on a statute-by-statute basis, no reason exists for the Court to intercede with respect to FIFRA. As noted

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[8] As a consequence, pre-*Cipollone* cases on both sides of the preemption issue are of somewhat diminished significance. Thus, while the pre-*Cipollone* appellate courts that found preemption did so on the basis of *implied* preemption analysis, rather than the *express* preemption analysis apparently required under *Cipollone*, the analysis reflected in *Ferebee* and *Ciba-Geigy* is likewise inconsistent with the principles set forth in *Cipollone*, as the U.S. Court of Appeals for the Fifth Circuit recently pointed out in *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1425 n.9 (5th Cir. 1993).

[9] Even if the Court were to accept petitioners' invitation to examine both trial court and appellate decisions (Pet. 11), since *Cipollone* the decisions at all court levels are nearly unanimous in result: thirteen of fourteen courts to rule have concluded that claims such as petitioners' are preempted by FIFRA. *See* Pet. 11 and *Papas II*.

above, both federal courts of appeals that have addressed FIFRA's preemptive effect since *Cipollone* reached the same result as the court below, and the issue of FIFRA's preemptive effect on state common law claims is pending in cases before the First, Fourth and Ninth Circuits.[10] Should the decisions in those cases reveal any particular problems or significant inconsistencies, the Court can decide then whether its review is warranted. The Court's intercession now is unnecessary and premature.

4. In any event the result reached by the Court below was correct and fully consistent with *Cipollone*.[11] Petitioners do not dispute that § 136v(b) of FIFRA expressly preempts positive state enactments (such as statutes or

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[10] *Worm v. American Cyanamid Co.*, No. HAR-90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 30, 1992); *King v. E.I. duPont de Nemours & Co.*, 806 F. Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339 (D. Mont. 1991), *appeal filed*, No. 91-36024 (9th Cir. Sept. 13, 1991).

[11] Petitioners make much of the fact that the Nevada Supreme Court ultimately rested its conclusion on a finding of *implied* preemption, while this Court in *Cipollone* instructed that, when Congress has explicitly addressed the issue of preemption in a provision that provides a reliable indicium of congressional intent with respect to state authority, the court should limit its analysis to the express terms of that provision. 112 S. C. at 2618. Pet. 15-16, 20. It bears noting, however, that the Nevada Supreme Court decided against *express* preemption based solely upon the absence of an explicit reference to state common law remedies in § 136v(b). Pet. App. 8a-9a. Its holding in this regard was equally inconsistent with *Cipollone*, which based a finding of express preemption on closely similar statutory phrasing in the federal cigarette labeling statute that likewise contained no explicit reference to state common law remedies. *See* 112 S. Ct. at 2617. Moreover, as noted *supra*, page 8 n.5, the opinion below contains all of the elements of the analysis called for by *Cipollone*; it merely addressed them under the rubric of implied preemption. That linguistic confusion is scarcely a basis for this Court's review, *see Miroyan v. United States*, 439 U.S. 1338 (1978), or for the more drastic remedy of summary reversal requested by petitioners. Pet. 16.

regulations) related to labeling or packaging. *See* Pet. 17. *Cf. Wisconsin Public Intervenor*, 111 S. Ct. at 2486. Rather, the point in contention is whether state common law inadequate labeling claims are also preempted.

The answer to that question is given by the plain words of § 136v(b), which—in a subsection titled, "Uniformity" —broadly prohibit states from imposing or continuing in effect "any requirement"—not just positive enactments— "for labeling or packaging." The phrasing of § 136v(b) is nearly identical to that the Court found preemptive in *Cipollone* ("no requirement or prohibition . . . shall be imposed"), 112 S. Ct. at 2617, notwithstanding the same argument petitioners make here, that only positive enactments are encompassed by the phrase "no requirement or prohibition":

> Petitioner . . . argues that common law damages actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

Cipollone, 12 S. Ct. at 2620. *Accord International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

Relying expressly on *Cipollone* the Tenth Circuit concluded that § 136v(b)'s prohibition of "any" requirement

is the functional equivalent of the section 5(b) of the Public Health Cigarette Smoking Act and rejected the notion that FIFRA's preemptive effect extends only to positive state enactments:

> While plaintiff argues a congressional preemption of state law extends to positive legislative acts only, we do not agree. When one looks to the purpose underlying both legislative regulation of labeling and packaging and a state common law duty to warn, it becomes evident those purposes are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden. . . . Both address a manufacturer's duty to convey information about a product through the medium of a label. . . . Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute.

Arkansas-Platte II, 981 F.2d at 1179. *Accord Papas II*, 985 F.2d at 518 ("*Cipollone* convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.' "). The plain wording of § 136v(b) thus reaches common law claims as well as positive state enactments.[12]

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[12] In arguing to the contrary, petitioners contend that the phrase "Such State" in § 136v(b) refers back to § 136v(a), which is limited to state "regulation." Pet. 17. Leaving aside the point noted in text above, that "regulation" can be achieved as easily through common law damages as through so-called positive enactments, it is sufficient answer to petitioners to note, first, that the word "Such" in § 136v(b) modifies "State," not "requirements," and, second, that if Congress had intended to limit § 136v(b) to positive state enactments, it could have used the term "regulation" in § 136v(b), as it did in § 136v(a). Instead, it used the far broader phrase, "any requirements." The choice of those two different terms in close

The legislative history of the 1972 amendments upon which the court below relied (Pet. App. 10a-11a, 14a) confirms the conclusion that § 136v(b) "sweeps broadly" and was intended to reach common law labeling requirements. Thus, the House Committee Report accompanying the original bill stated:

> The States are given prime responsibility for the certification and supervision of pesticide applicators. The Federal Government sets the program standards the States must meet. *State authority to change Federal labeling and packaging is completely preempted*, and State authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 92-511, 92nd Cong., 1st Sess. 1-2 (1971) (emphasis added). *See also id.* at 16 (". . . the Committee has adopted language to completely prempt State authority in regard to labeling and packaging"). The Senate Reports were to the same effect. *See* S. Rep. No. 838, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021; S. Rep. No. 970, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4128.[13] As the court below concluded, these excerpts "demonstrate that Congress intended § 136v(b) to 'com-

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juxtaposition must be considered intentional. *Russello v. United States*, 464 U.S. 16 (1983). Contextual analysis thus confirms that Congress meant § 136v(b) to reach requirements imposed under common law as well as those imposed under other sources of state law.

[13] These passages answer petitioners' effort to distinguish *Cipollone* on the ground that the legislative history of the cigarette labeling statute revealed more specific congressional intent to encompass common law claims than does that of FIFRA. Pet. 17-18. In fact, the Court noted in *Cipollone* that portions of the legislative history at issue there suggested "that Congress was primarily concerned with positive enactments by States and localities." 112 S. Ct. at 2620. To that degree FIFRA's legislative history provides even stronger support for the natural reading of § 136v(b)'s words than did the legislative history involved in *Cipollone*.

pletely preempt' state authority to change federal labeling." Pet. App. 14a.[14]

Petitioners nevertheless point out that EPA may find a pesticide to be misbranded under FIFRA, even if EPA has previously approved the label, 7 U.S.C. § 136(q)(F)-(G), if the label does not contain a warning adequate to protect health and the enviromnent—apparently suggesting that the fact that EPA is free to second-guess its own determination of label adequacy under FIFRA (presumably on the basis of new information) somehow leaves room for each of the fifty states at any time to determine under its own common law whether the EPA-approved label is in fact adequate to protect health and the environment. Pet. 18. Such common law determinations of label adequacy, however, would plainly be "in addition to or different from" EPA's determination under FIFRA, and allowing them would, as the court below

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[14] Petitioners' assertion that Congress "ratified" the D.C. Circuit's 1984 non-preemption holding in *Ferebee* when it revised FIFRA in 1988 without changing the wording of § 136v(b) is simply wrong. Pet. 19. While the Court has cautioned that Congress is presumed, when it legislates, to take into account "the contemporary legal context," a particular judicial result is treated as part of that context only when it reflects the "routine[] and consistent[]" holdings of numerous judicial decisions. *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-81 (1982). It is doubtful that a single decision could satisfy that test; in any event, by 1988 there was no judicial consensus in the issue of FIFRA preemption. *Ferebee* was counterposed by other decisions finding preemption—*see, e.g., Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Stiltjes v. Dettlebach Pesticide Corp.*, 343 S.E.2d 715 (Ga. App.), *aff'd on other grounds*, 347 S.E.2d 568 (Ga. 1986)—and there is no indication in the legislative history of the 1988 amendments that Congress favored the *Ferebee* viewpoint. To the contrary, Congress' 1988 addition of the heading "Uniformity" to § 136v(b) more strongly suggests that Congress agreed with those cases finding preemption of common law claims.

observed (Pet. App. 18a), defeat the "Uniformity" Congress sought to achieve by § 136v(b).[15]

As the court below noted, Pet. App. 12a-14a, the logic for preemption of common law claims in this narrow area is clear from the statutory scheme. Far from giving pesticide manufacturers "wide latitude to decide the language of pesticide labels," Pet. 18, FIFRA prescribes the scope, content, wording and format of product labels, including warning statements, in excruciating detail. *See generally* 40 C.F.R. § 156. For example, the implementing regulations dictate which of four signal words must be used on the label depending upon the toxicity rating of the pesticide, 40 C.F.R. § 156.10(h)(1), and the manufacturer cannot use either more than one signal word or one associated with a higher toxicity category. 40 C.F.R. § 156.10(h)(1)(i)(E). Thus, for example, Velsicol could *not* add the word "Poison" or place a skull-and-crossbones on the label of Gold Crest Termide—even if a state court jury found the label inadequate without it—because the product is not sufficiently toxic to warrant such a warning.[16]

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[15] Faced with similar arguments on remand following this Court's decision in *Cipollone*, the Eleventh Circuit responded:

> Those allegations, like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, [the manufacturer] adequately labelled and packaged its product. This inquiry is precisely what section 136v(b) forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that [a plaintiff's] claims require a showing that [the manufacturer's] labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone*, 505 U.S. at ——-——, 112 S. Ct. at 2621-22.

Papas II, 985 F.2d at 518.

[16] Petitioners' description of the label drafting and approval process, Pet. 19, is thus misleading. While it is true that it is the registrant who "drafts" the label in the first instance, the drafting is done pursuant to highly detailed instructions. Likewise, while a

These requirements, and similar others laced throughout the labeling regulations, *see* Pet. App. 13a, led the court below to conclude:

> . . . [A] jury determination that a label is inadequate would directly conflict with the EPA's determination that the label is adequate to protect man and the environment. National uniformity in pesticide labelling would also be frustrated by state common law tort claims. Therefore we hold that these claims are preempted. . . .

Pet. App. 17a-18a. This conclusion is fully consistent with *Cipollone* and with the decisions of the only two courts of appeals that have addressed *Cipollone*'s effect on FIFRA preemption issues.

There is no dispute that the claims found preempted in the proceedings below squarely challenged the adequacy of Velsicol's EPA-approved label. That being so, they clearly sought to impose a "requirement for labeling or packaging in addition to or different from" those imposed under FIFRA. The Nevada Supreme Court, therefore, properly held that those claims are preempted under § 136v(b) of FIFRA. There is no error for this Court to correct.

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registrant may decide to seek EPA's approval to change the label, such a change may also be independently *required* by EPA in the exercise of its continuing oversight of label adequacy, *see* 40 C.F.R. § 152.130(d), and in any event "no change in . . . precautionary statements or directions for use" may be made without prior EPA approval. *See* 40 C.F.R. § 152.46(a)(1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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